# Agency Counsel Newsletter

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## A NOTE FROM THE ATTORNEY GENERAL

To All Agency Counsel:

As I begin my eighth year as Attorney General, I am proud of the many accomplishments that my Office has achieved by working together with state agencies throughout the Commonwealth. As I complete my term as Attorney General, I remain committed to the principles that have forged an excellent working relationship between agency counsel and the Attorney General's Office.

This issue of the Agency Counsel Newsletter follows the tradition established by previous Newsletters, combining articles on recent developments in case law of interest to agency counsel; articles highlighting recent achievements in areas that I have defined as "priority" areas within the office, such as diversity and health care; articles on other matters of particular interest to agency counsel; and articles on lessons that the Office of the Attorney General has learned in representing agencies in litigation.

Many of the articles in this issue of the Newsletter relate to the common theme of "Making Government Work," one of my priorities as Attorney General. As I have noted in previous issues of the Agency Counsel Newsletter, there are a number of ways in which the Office of the Attorney General has worked with agency counsel (and will continue to do so) toward this goal. One of the articles in this Newsletter addresses the use of alternative dispute resolution and sets forth some practical information for agency counsel considering the use of this valuable technique to resolve litigation more efficiently. Another article summarizes a recent presentation on the use of "loss prevention" techniques and provides helpful insights to agencies seeking to control liability and litigation costs. An article on the new Massachusetts Rules of Professional Conduct provides a useful outline of the impact of the new rules on government attorneys. Because, as government attorneys, the

Office of the Attorney General and agency counsel have a special obligation to serve the public interest, we must be aware of our professional responsibilities under the Rules and comply with those responsibilities. This is one important way in which the Office of the Attorney General and agency counsel can strive to make government work better.

Two articles in the section of the Newsletter on "Lessons We Have Learned" also present information that agency counsel should find useful in their oversight of administrative decision-making. One of these articles surveys the reasons that agency decisions have been overturned by the SJC and Appeals Court during the 1996-1997 court year. The other article discusses the importance of setting forth accurate information in agency notices to parties concerning the availability of judicial review. By informing agency counsel of ways in which agencies can make their decisions less vulnerable to legal challenge, these articles are aimed at minimizing litigation.

The article on the efforts of a new Workforce Diversity Committee in the Office of the Attorney General highlights my commitment to ensuring a diverse workplace, an area that I have designated as a priority area. I hope that this Committee will serve as a model for other state agencies that are attempting to address this important issue. Ensuring that government reflects the diverse population of the Commonwealth is an important way in which we can make our government function better on a human scale. Health care, another area that I have designated as a priority area, is highlighted in the article on the Commonwealth's litigation against the tobacco industry. As discussed in the article, the litigation brought by the Commonwealth to recover the costs of Medicaid expenditures for smoking-related diseases, together with the Commonwealth's enactment of a tobacco ingredient disclosure law, represent a historic step in a battle to protect public health. These are initiatives of which I am particularly proud, as I anticipate that they will yield significant health benefits to every citizen in the Commonwealth.

I look forward to continuing to provide the best possible representation to state agencies, so that together we can make our state government serve the public efficiently and effectively.

Sincerely,

Scott Harshbarger

**A SPECIAL NOTE TO NEW AGENCY COUNSEL**

New agency general counsel are invited to contact Sherrie Costa (727-2200, ext. 2071) to set up a meeting with Peter Sacks, Chief of the Government Bureau; Judith Yogman, Chief of the Administrative Law Division; and John Bigelow, Chief of the Trial Division, to discuss pending and anticipated litigation affecting your agency and other litigation-related issues of mutual interest and concern.

**A REMINDER CONCERNING THE NEWSLETTER**

The Agency Counsel Newsletter is intended only to provide information to agency counsel and should not be cited as legal authority, or as an opinion of the Attorney General, in administrative or judicial proceedings. Additional information concerning the issues discussed in each article in the Newsletter, as well as citations to legal authority where appropriate, are available from the contact person listed for each article.

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## SOME RECENT CASES

**Tobacco Litigation.**

The Commonwealth currently is a party to two actions involving the tobacco industry. In the first action, Commonwealth v. Philip Morris, Inc., et al., the Commonwealth sued the cigarette industry, its trade associations and distributors, alleging a 50-year conspiracy by the tobacco industry against the public health and seeking reimbursement of Medicaid expenditures attributable to tobacco-related disease, fines and penalties and other relief under the state consumer protection act and under related statutes and common law doctrines. In filing the suit (referred to here as the "Consumer Protection and Medicaid Reimbursement action"), the Commonwealth became the fifth state in the country to bring suit against the tobacco industry based on its wrongful conduct against both the state and its citizens. Today, 41 Attorneys General from different political parties and geographic regions have joined in litigation against the tobacco industry in a non-partisan attempt to protect public health and prevent future generations of children from suffering the health risks associated with smoking. The Consumer Protection and Medicaid Reimbursement action, filed in 1995, is pending in Middlesex Superior Court. The Office of the Attorney General successfully defended against the tobacco industry's attempt to remove the case to federal court, and we also succeeded in prevailing against a barrage of motions to dismiss the Commonwealth's claim (a result of which we are particularly proud, since a number of other states have lost many of their claims at this stage of the litigation).

In the Consumer Protection and Medicaid Reimbursement action, the Commonwealth received more than 200 requests for the production of documents from the tobacco company defendants. Beginning last summer, many agencies across the Commonwealth have been working with attorneys from the Office of the Attorney General and with Special Assistant Attorneys General to respond to these requests. The cooperation from all agencies involved has been tremendous. As a result, millions of pages of documents have been produced more efficiently and in less time than in any other comparable litigation in the country. Agency counsel have been of great assistance in achieving this result, as have the many individuals with responsibilities in areas relevant to the

case. All this hard work is much appreciated as the case moves toward trial.

In the meantime, in June 1997, the tobacco industry and the Attorneys General of Massachusetts and 40 other states reached a proposed settlement of the states' health reimbursement cases which, if approved by Congress, would result in settlement of the Consumer Protection and Medicaid Reimbursement action. Under the Attorneys' General proposal, the tobacco industry would make payments of $368.5 billion over the next 25 years. The proposal also contains significant public health provisions that would form the first comprehensive national tobacco control policy in our nation's history. These provisions include the following:

a national goal of reducing the rates of youth smoking in the United States by 30% in 5 years, 50% in 7 years, and 60% in 10 years from the levels over the last decade;

assessment of penalties by the federal Food and Drug Administration ("FDA") on tobacco product manufacturers if the youth smoking reduction goals are not achieved;

a complete ban on outdoor advertising by the tobacco industry, together with stronger restrictions on advertising, marketing and promotion of cigarettes;

larger and more prominent package and advertising warning requirements;

expanded restrictions on youth access to tobacco products;

expansion of jurisdiction of the FDA over nicotine-containing tobacco products;

mandatory disclosure by brand and by quantity in each brand, of all additives and non-tobacco ingredients, together with mandatory, FDA-regulated (and industry-funded) testing of such additives and ingredients;

mandatory disclosure to the FDA and the public of safety assessment test results and of all tobacco industry research into the health and dependency effects of tobacco products;

creation of a national tobacco control program at the federal department of Health and Human Services; and

passage of a bill prohibiting smoking in all public facilities with certain exceptions for bars and other predominantly adult facilities.

Of critical importance to the states, the settlement proposal requires the tobacco industry to enter into judicially enforceable consent decrees in each court where it is a defendant in a state lawsuit, thereby enabling states to enforce the terms of the new law concurrently with (and independently of) any FDA enforcement action. This is critical to protect the states from future situations where a federal agency declines to take action.

Various proposals currently are under review by Congress that would implement some or all of the June 1997 settlement proposal. Unless Congress enacts a national tobacco control law along the lines of (or stronger than) the June 1997 settlement proposal, our office intends to proceed to trial on the consumer protection and Medicaid reimbursement case in late 1998 or early 1999.

The second action currently pending in Massachusetts, Philip Morris, Inc., et al v. Harshbarger, et al. (together with a related action, United States Tobacco Corp., et al v. Harshbarger, et al.) involves a challenge by the tobacco industry to the tobacco products ingredient disclosure law, enacted by the Massachusetts Legislature in 1996. The Massachusetts Ingredient Disclosure Law required cigarette and smokeless tobacco product manufacturers to disclose by brand, in descending order of weight or other measure, the non-tobacco ingredients in their products and to submit more accurate nicotine yield test results.

This legislation was the first such statute in the country. The tobacco industry challenged the law in federal court, arguing that the Massachusetts law was preempted by federal law. The Office of the Attorney General successfully defended against the preemption claim; and, in August 1997, the United States Court of Appeals for the First Circuit upheld the Ingredient Disclosure Law against the preemption claim. The tobacco industry then sought a preliminary injunction in federal district court on its other challenges to the Ingredient Disclosure Law, including the

claim that the disclosure of the industry's "recipes" constitutes an unconstitutional taking of corporate trade secrets. The industry obtained a preliminary injunction of the disclosure requirement on December 10, 1997 in federal district court. On December 12, 1997, the Office of the Attorney General appealed the injunction to the First Circuit. If the Commonwealth prevails in the appeal of the injunction or in the district court on the merits of the claim, the Massachusetts Department of Public Health will be the first government agency in the United States to receive a brand-by-brand list of ingredients. (Contact: AAG Rosalyn Garbose, Consumer Protection/Antitrust Division)

**Antell v. Attorney General** (Suffolk Superior Court, 1997).

In Antell, the plaintiff filed a public records request for certain documents relating to a closed criminal investigation which had been conducted by the Criminal Bureau of the Attorney General's Office several years earlier. The Criminal Bureau turned over certain of the requested documents but withheld others on the basis, among other things, of the work product doctrine. The Supervisor of Public Records issued an order directing the Office of the Attorney General to turn over the records.

The plaintiff then brought an action in Suffolk Superior Court, seeking an injunction to enforce the order issued by the Supervisor of Public Records. The Superior Court heard oral argument on plaintiff's request for preliminary injunction and ordered that the withheld documents be submitted to the court for in-camera review. In a decision dated August 14, 1997, the Superior Court held that certain documents could be withheld either partly or in their entirety because they constituted work product. In a ruling significant for all government attorneys, the court held that the work product doctrine had not been displaced by the public records law, thereby resolving an issue that had been the subject of differing views within various governmental agencies. The court stated:

> Work product for public sector attorneys is a well established legal doctrine. . . . Therefore, the Legislature must expressly abrogate this legal principle for the Public Records Act to vitiate the

> work product doctrine. . . . I find and rule that the Public Records Act should not be read to abrogate the common law work product doctrine.

Memorandum of Decision at 3. For a more general (although brief) discussion of the work product doctrine as applied to government attorneys, see Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 309 (1991) (internal documents prepared for litigation by Attorney General, containing litigation strategies and policies of that office, constituted protected work product). (Contact: AAG Jane Willoughby, Administrative Law Division)

## THE ATTORNEY GENERAL'S PRIORITIES

### The Attorney General's Workforce Diversity Committee

Early last year, the Office of the Attorney General established a Workforce Diversity Committee for the purpose of taking steps to create a more diverse and inclusive workplace within the Office. Vernā Myers, previously a consultant to the office on diversity issues and now Deputy Chief of Staff, leads the Diversity Committee and oversees the Attorney General's priority on race, diversity and inclusion. This priority stems from the belief that the Office must reflect the core values of fairness, equal opportunity and excellence for all and serve as a model for other state agencies. In designating race and diversity as a priority matter, the Attorney General sought to address issues of workplace diversity and charge staff with finding ways to ensure that people of color and members of under-represented groups receive equal justice and protection.

The Diversity Committee is an outgrowth of the successful work of the Racial and Ethnic Bias Task Force, established by the Attorney General in 1995. The Attorney General directed the Task Force to take steps to address the systemic barriers to equal justice in the workplace and the courts documented in a 1994 report by the Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts. The Task Force has sponsored, among other programs, successful diversity training programs, an effective interview techniques session, and a series of forums for the legal community to examine the role race plays in the criminal justice system. In addition, the Task Force translated

into seven languages, in addition to English, an informational brochure on court procedures to assist victims of domestic violence.

The Diversity Committee is comprised of a cross-section of the Office representing individuals of different races, experiences, job responsibilities and bureaus, many of whom had begun working on some of these issues in the Racial and Ethnic Bias Task Force. One of the first tasks of the Committee was to create a statement of the mission of the office with regard to diversity. The Attorney General and members of the Committee unveiled the office diversity mission statement to staff in October 1997.

The work of the Committee has generated a good deal of energy and enthusiasm in the Office. The Committee believes that achieving a more diverse and inclusive work environment will enhance the Office's ability to attract and retain the best staff, encourage people to give and do their best, stimulate innovation and creative work solutions and enable us to better serve the needs of the diverse citizens of Massachusetts. The Committee also hopes that its efforts to promote inclusion and equal opportunity for all will serve as a model for public and private institutions throughout the Commonwealth. For more information regarding the diversity initiative, please call Vernā Myers at 727-2200, ext. 2023.

**Controlling the Cost of Litigation**
**Through Loss Prevention Techniques**

As part of the Attorney General's "Making Government Work" initiative, the Government Bureau recently conducted a loss prevention and litigation control seminar for state agencies. The purpose of the seminar was two-fold: to inform state agencies about safety precautions that can be taken on state premises owned or controlled by the Commonwealth in an effort to reduce the Commonwealth's liability for accidents occurring on such premises, and to instruct agency managers with respect to the importance of gathering post-accident information.

Thousands of people visit facilities owned by the Commonwealth each year. In the interests of ensuring worker and

visitor safety and reducing litigation costs (thereby promoting taxpayer savings), every state agency should make accident prevention a priority.

The seminar focused on the excessive costs associated with accidents that occur on premises owned or controlled by the Commonwealth or by non-governmental entities, thus demonstrating the importance of taking steps to prevent accidents from occurring. Examples from the private sector and the Commonwealth showed that accidents cost businesses and the Commonwealth millions of dollars annually.

One of the seminar's featured speakers, the National Safety Manager for Anheuser-Busch, noted that his company was inspired to revamp its safety and accident reporting programs, since general accident and workers' compensation payments were sharply reducing the company's profits. The company began making premises safety a priority and started this process by examining the type of work performed in its plants, offices, and theme parks. The company assessed the layout of its premises to ensure that there were no design hazards in its property. The safety manager also sought to ensure that all of the premises were properly maintained. The safety manager emphasized that the best way to accomplish proper maintenance of premises was to make people accountable before an accident occurred. To that end, Anheuser-Busch subdivided its premises into areas and established safety teams for each area. Managers, employees, and office personnel were required to inspect their assigned areas for maintenance defects. Common examples of such defects included holes in carpets or walkways, wet floors, broken floor tiles, and poor lighting. The company developed a safety plan that required immediate response to a known defect; under the plan, employees were required to fix the defect, if possible; notify a supervisor of the defect; immediately contact a department that could repair the defect; and follow up to ensure that the defect was repaired.

In addition to establishing safety teams, the company developed seminars designed to train personnel on safety procedures and proper response to accidents. For example, the company developed a new safety procedure for vendors and employees unloading products from trucks to loading docks and required that employees and vendors be familiar with the procedure and sign safety forms documenting completion of the

safety procedure. The company retained these safety forms, creating a helpful record of compliance with safety measures.

The safety manager recommended that state agencies establish their own safety programs, both to reduce litigation and create a better environment for visitors and employees. By way of example, the safety manager explained that, at one plant alone, Anheuser-Busch, under the guidance of its safety manager, reduced workers' compensation costs from approximately $4 million per year to $300,000 per year. Payments for accidents to visitors or non-employees were similarly reduced.

Another speaker, an insurance claims specialist, gave a presentation on the importance of proper information-gathering techniques, including reporting accidents, obtaining names of witnesses, obtaining addresses, taking names of parties involved and taking photographs, if possible. All of these actions at the time of an accident help to establish a clear record of events. In addition, proper information-gathering techniques provide evidence that is helpful in defending against future litigation. The insurance claims specialist also reviewed factors that insurers typically consider in determining whether a claim of an accident is fraudulent. Such factors include unwitnessed accidents, accidents that occur early Monday morning, accidents after a layoff or termination, accidents not reported promptly, the presence of financial motives, and lack of cooperation regarding details of the accident. The specialist recommended the use of an Insurance Index by agencies. Such an index provides information regarding any prior accidents sustained by a claimant. For more information regarding the Index, contact AAG Margaret Bulger in the Trial Division at 727-2200 ext. 3331.

Finally, Beverly Roby, an AAG in the Administrative Law and Trial Divisions, made a presentation on the applicable statutes and case law governing premises liability claims. AAG Roby emphasized that an agency's failure to cure premises defects or place warning signs can result in very substantial verdicts against the agency. AAG Roby also noted the increase of cases against the Commonwealth alleging negligent security measures. In an effort to reduce these claims, AAG Roby suggested that agencies adopt procedures to make premises more secure, such as ensuring that doors are locked on college campuses and in office buildings. She also recommended the use of security units or

inspection personnel. Like the Anheuser-Busch safety manager, AAG Roby emphasized the importance of holding agency personnel accountable to achieving the goal of protecting against premises liability.

Taking tips from businesses like Anheuser-Busch concerning ways to reduce litigation arising from accidents on premises can help achieve the goal of making government work more efficiently. Since the Commonwealth spends millions of dollars on litigation each year, it is important for agencies to take a more pro-active approach to both avoiding and addressing litigation arising from accidents.

Some agencies have expressed interest in attending a loss prevention seminar focused on motor vehicle claims. If your agency has an interest in such a seminar, or for further information on how to approach claim reduction generally, contact AAG Margaret Bulger in the Trial Division.

## MATTERS OF CURRENT INTEREST

### Using Alternative Dispute Resolution Techniques In Civil Cases

The Office of the Attorney General encourages the use of, and employs, alternative dispute resolution ("ADR") techniques such as mediation and, to a lesser extent, arbitration, where they will improve the prospects for settling a case. While ADR is not appropriate for all cases, it often provides a faster and more efficient mechanism for resolving a case than litigation and generally allows the parties to fashion a more creative, stronger, and more durable agreement than would result from litigation.

The Office of the Attorney General primarily uses mediation, which is a voluntary process involving a third-party neutral individual assisting the parties in negotiating an acceptable settlement, because it is non-binding and it allows the parties to fashion a process they are comfortable with and to preserve whatever other options they may have until an agreement is reached. Where parties in litigation have little control over the judge ruling on their case, parties select the mediator and can choose among mediators with different styles and substantive

knowledge. Mediation, finally, in contrast to litigation, is usually not conducted publicly. While the results are public, usually the negotiations and discussions will be conducted in a confidential manner. See G.L. c. 233, § 23C.

The use of mediation often leads to settlements, but where it does not, it usually narrows the range of issues in dispute, allows parties to vent any of their emotions or concerns, advances settlement discussions among the parties appreciably, and educates each side as to the strengths and weaknesses of its case. As a consequence, even in the absence of an immediate settlement, the parties generally find that mediation aids substantially in obtaining the resolution of a case. A recent study of court mediation programs conducted for the Supreme Judicial Court concluded that, regardless of the outcome of the case and whether or not they were happy with the outcome, both parties and attorneys gave very positive evaluations to mediation.

Certainly, some kinds of cases are not appropriate for ADR. If the Office of the Attorney General and a client agency want to obtain court resolution of an important legal question, then ADR is not appropriate. If the attorneys for the parties have been able to negotiate successfully, relationships are good, and there is room for the parties to reach agreement, then ADR may not be necessary. In the event that it appears that one party seeks to use ADR for an ulterior purpose, rather than to negotiate in good faith--for example, for purposes of delay or to obtain free discovery--again ADR may not be appropriate. Finally, ADR may not be worth pursuing if a case is readily disposable by a straightforward motion.

The use of ADR is also not a substitute for proper case preparation. Lawyers and parties who enter a mediation fully prepared on the facts and the law will fare far better than those who enter unprepared. Indeed, if parties are not prepared when the mediation begins, settlement discussions may break down simply because there are too many unknown variables, so that the parties cannot easily narrow the range of possible outcomes of the case. For example, if a critical witness has not been deposed and the strength of each party's case hinges on the substance of the witness's testimony, it will usually benefit the parties to depose the witness before the mediation.

The Office of the Attorney General has used ADR successfully in a wide variety of cases, including environmental, tort, employment, charities, and administrative cases. Some of these cases have arisen out of the operation of existing court-related ADR programs. The Massachusetts Office of Dispute Resolution runs mediation and case evaluation programs for the Suffolk and Norfolk Superior Courts and also provides mediators for public disputes and controversies or cases involving state agencies. The Middlesex Multi-Door Courthouse runs a similar program in Middlesex County. In each program some cases are called for screening directly by the court; but, in addition, parties (either individually or collectively) can refer their case to the program to determine if ADR would be appropriate.

In some instances, once a dispute has become apparent to the Attorney General's Office, the Office has entered into mediation in order to explore settlement before the various parties expend enormous amounts of time, energy, and resources in litigation. This approach has also allowed the parties an enhanced measure of confidentiality in the negotiations that occur.

The Office has found that the use of ADR, in consultation with agency counsel, allows the safe exploration of potential alternative resolutions, provides for considerable education of the parties about both sides of the case, and controls personal animosities in negotiations. In some mediations, attorneys for the Office have found ways to provide opposing parties with components of a settlement which the other side values highly and which our Office values much less. In the absence of a mediator, attorneys in our Office would never have been able to discover the differences in valuation and judgment. In other cases, the Office of the Attorney General has found that the mediator can present parts of the case with much more impact on the other side than the Office's traditional advocacy produces. And on occasion the Office, knowing that a case presented potential exposure, has used mediation in order to moderate the outcome.

Recent examples of cases in which the office used mediation successfully include:

a cumbersome, multi-party construction case;

a sexual harassment case involving a number of agency employees;

a dispute about permits issued by a state agency for commercial whitewater rafting; and

a tort case involving an individual injured while in the care and custody of a state agency.

The Office of the Attorney General has developed criteria concerning the use of ADR in cases as well as training materials dealing with preparation for and advocacy during mediation which are available. In addition, if you have any concerns about whether ADR is appropriate for a particular case or controversy, or if you have questions about ADR techniques, practices, or procedures, please feel free to contact this office. (Contact: AAG Jamie Katz, ADR Coordinator)

**New Regulation Under Fair Information Practices Act Eases Information Sharing with Attorney General**

The Executive Office for Administration and the other secretariats have recently promulgated a new joint regulation, 801 C.M.R. 3.00, that implements the Fair Information Practices Act, G.L. c. 66A ("FIPA"). The new regulation includes a section that allows state agencies to share "personal data" with the Office of the Attorney General where necessary either (1) to investigate a possible violation of law, or (2) to defend against a claim that the data subject has filed or threatened to file against a state agency, official, or employee. 801 C.M.R. § 3.04 (see full text below). "Personal data" is, in shorthand terms, data concerning a specifically named or identifiable individual (other than Criminal Offender Record Information ("CORI") and certain other criminal justice system information) that is held by a state agency but is not in a public record. G.L. c. 66A, § 1. In the past, some agencies felt that FIPA constrained their ability to share "personal data" with the Office of the Attorney General to assist in law enforcement or in defending claims against state agencies and officials. The new regulation, 801 C.M.R. § 3.04, allows them to do so in accordance with the procedures laid out in the regulation. The regulation, entitled "Access by the Office of the Attorney General," provides:

Whenever a data subject files or threatens to file a claim against the Commonwealth, including executive offices, agencies, or departments, or against any employee or officer of the Commonwealth, concerning a matter within the scope of the office or employment with the Commonwealth, any personal data concerning the data subject that is relevant to the determination of issues in dispute shall be provided to the Office of the Attorney General upon request. Such request must be in writing and contain a clear description of the data sought, the reason for the request, and the intended use of the data. In supplying such data, the holder must redact any data concerning non-parties. Any personal data indicating a violation of law may be referred to the Office of the Attorney General for investigation and enforcement. Any authorized assistant attorney general may further disclose the personal data to the extent deemed necessary to defend the Commonwealth, officer or employee effectively against the data subject's claim. No data may be released where prohibited by statute.

Agencies contemplating transmission of any personal data to the Attorney General under the regulation should contact our office before doing so, to ensure that the regulation's procedures are followed and to discuss other legal constraints that may apply to the transmission of such data. Questions regarding the new regulation may be addressed to Peter Sacks, Chief of the Government Bureau, at (617) 727-2200, ext. 2064.

**New Rules Governing Lawyers' Professional Conduct**

As of January 1, 1998, lawyers in Massachusetts are governed by a new set of ethical rules, the Massachusetts Rules of Professional Conduct ("Rules"), which replaced the old Canons of Ethics; Disciplinary Rules ("DR"). These new Rules are based primarily on the American Bar Association Model Rules of Professional Conduct and are intended to address lawyers' conflicts of interest in a more straightforward and detailed fashion than the former DR.

Some of the changes in the Rules from the DR are significant and should be reviewed carefully by all attorneys who practice law in Massachusetts. This memorandum attempts to outline some of the changes of particular significance to government attorneys, including paragraph [4] of the Scope, Rule 1.11, Rule 3.3, Rule 3.4, Rule 3.8, Rule 4.2, Rule 4.3, and Rules 5.1-5.3.

The Legal Counsel to the Office of the Attorney General has formed a Rules Working Group to establish guidelines on how to implement the new Rules. The guidelines may be employed as a reference for agency counsel.

**Scope**

Paragraph 4 of the Scope section of the Rules acknowledges the difference between public and private sector lawyers. Specifically, paragraph 4 notes that a government attorney may have authority concerning legal matters that would ordinarily rest with the client and also may be authorized to represent multiple interests in intra-governmental legal controversies.

**Rule 1.11 Successive Government and Private Employment**

This Rule recognizes potential issues of conflict when a lawyer changes employment from the public sector to the private sector and from the private to public sector. This Rule provides that appropriate measures shall be taken to ensure that government agencies and parties are informed of any potential conflict and that lawyers are screened from matters in which they participated personally and substantially as a public officer or employee in their new position of employment. For comparison, see also the corresponding state ethics laws, G.L. c. 268A, §§ 4, 5, 6 and 23(b)(3).

**Rule 3.3 Candor Toward the Tribunal**

Rule 3.3(a)(4) provides that (except as provided in Rule 3.3.(e)) a lawyer shall take "reasonable remedial measures" when the lawyer has offered false material evidence, or the lawyer's client or witnesses testifying on behalf of the client gives false material evidence and the lawyer comes to know of its falsity.

Under this new rule, a lawyer must take steps to correct the falsity, which may include disclosing material facts to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, when the client has refused to rectify that criminal or fraudulent act. Rule 3.3(a)(2) and Comment [2A]. The only exception to this requirement involves the special rule regulating the defendant's testimony in a criminal case. Rule 3.3(e).

Thus, the Rule suggests that when there is a conflict between a lawyer's duty of confidentiality and the lawyer's duty as an officer of the court, the duty of candor takes precedence. Because this situation can create a difficult conflict between protecting confidentiality, on the one hand, and ensuring candor to a tribunal, on the other hand, Rule 3.3 should be reviewed carefully and agency counsel should develop a policy governing circumstances where government lawyers are faced with witnesses or clients who they know have committed perjury before a tribunal.

**Rule 3.4 Fairness to Opposing Party and Counsel**

Rule 3.4 includes a provision analogous to Rule 3.3. Rule 3.4(b) provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely."

Rule 3.4(h) provides that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a **private** civil matter." The word "private" has been added to make clear that a government lawyer may pursue criminal or civil enforcement, or both criminal and civil enforcement, remedies available to the government.

**Rule 3.8 Special Responsibilities of a Prosecutor**

Rule 3.8 deals with Special Responsibilities of a Prosecutor. The Rules as adopted have no corresponding Rule dealing with issues concerning defense counsel in criminal cases. The court left largely untouched SJC Rule 3:08 which contains Standards Relating to the Prosecution Function (PF) and Defense Function (DF).

The Committee on Rules of Professional Conduct will be considering (a) what changes should be made in the standards set forth in SJC Rule 3:08 in light of the adoption of the new rules and (b) whether a rule applicable to criminal defense lawyers similar to RPC Rule 3.8 for prosecutors is desirable. Nonetheless, prosecuting attorneys should review and abide by Rule 3.8.

**Rule 4.2 Communication with Person Represented By Counsel**

Rule 4.2 concerns communications with a person represented by counsel. Rule 4.2 now reads, "In representing a client, a lawyer shall not communicate about the subject of the representation with a **person** the lawyer knows to be represented by another lawyer...." Rule 4.2 is significantly different from DR 7-104(A)(1) in that Rule 4.2 replaces the word "party" with the word "person." The term "person" as defined in Rule 9.1 is much broader than the word "party" and includes not only natural persons but also a "a corporation, an association, a trust, a partnership and any other organization or legal entity."

This one word change from "party" to "person" has been a great source of controversy in both civil and criminal matters, particularly as applied to government lawyers who conduct investigations of individuals employed by or associated with entities such as corporations. For example, in many criminal and civil enforcement cases, a corporation is represented by counsel and asserts that such counsel represents all of the corporation's employees. The assertion of "blanket" representation can obstruct the government lawyer's ability to fully investigate potential targets. This change may have implications for the extent to which private counsel suing state agencies may contact lower level agency employees. While that issue is beyond the scope of this article, agency counsel may be guided on that issue by American Bar Association Formal Ethics Opinion 97-408, "Communication With Government Agency Represented by Counsel."

**Rule 4.3 Dealing with Unrepresented Person**

Rule 4.3(a) places an additional responsibility on lawyers when dealing with individuals who are not represented by counsel. Rule 4.3(a) provides that, "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall

not state or imply that the lawyer is disinterested . . . ." In the event the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the Rule places an affirmative duty on the lawyer requiring him/her to make reasonable efforts to correct the misunderstanding.

**Rule 5.1 Responsibilities of a Partner or Supervisory Lawyer**
**Rule 5.2 Responsibilities of a Subordinate Lawyer**
**Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants**

Rules 5.1 through 5.3, on the responsibilities relating to the supervision of junior lawyers and non-lawyers, are identical to the ABA Model Rules 5.1 through 5.3. As Rules 5.1-5.3 have no corresponding DR, close attention should be paid to these new Rules given the additional responsibilities placed on all employees in the legal profession.

Rule 5.1(a) provides that "[a] partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." Rule 5.1(b) provides that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Comment 1 to Rule 5.1 makes clear that paragraphs (a) and (b) of Rule 5.1 apply to lawyers in government agencies. While this Rule is not a rule of respondeat superior for a subordinate's misconduct, the Rule requires "reasonable efforts" to give "reasonable assurance" of compliance with the rules. See J. Whitlock, "The New Massachusetts Rules of Professional Conduct: Ethical Responsibilities in Supervising Others and in the Sale of a Practice," 82 Mass. L. Rev. 289 (Winter 1997). This Rule is significantly different from the DR which holds an individual lawyer ethically responsible for his/her own conduct.

Most important, Rule 5.1(c)(2) explicitly places an affirmative duty on a supervising lawyer to take remedial action to avoid or mitigate the effect of a violation of the rules. Please see Comment [4] to Rule 5.1 for guidance.

Rule 5.2 confirms that subordinate lawyers are held to the same

ethical obligations under the Rules as their supervisory lawyer and requires the supervisory lawyer to take steps to assure that subordinate attorneys comply with such Rules. The Rule, however, provides the subordinate lawyer a small safe harbor for acting in accordance with a supervising lawyer's reasonable resolution of an arguable question of professional duty. 82 Mass. L. Rev. at 290.

Rule 5.3 outlines the responsibility of a supervising lawyer to make reasonable efforts to ensure that non-lawyers employed by, retained by or associated with the lawyer all comply with the rules. One such violation of the Rules includes the unauthorized practice of law and the disclosure of confidential client information. In addition, it is important that government lawyers ensure that steps are taken to prevent the unauthorized release of information related to an investigation or case that the lawyer is working on by investigators, support staff, or any members of the lawyer's office. While non-lawyers are not subject to discipline for non-compliance of the Rules, the Rule makes clear that a lawyer may not do through non-lawyers or agents what the lawyer cannot do him/herself.

Attorneys who have questions concerning the new Rules of Professional Conduct can contact the Board of Bar Overseers at 728-8750. An Assistant Bar Counsel is available on Mondays, Wednesdays, and Fridays between 2:00 and 4:00 p.m. to answer questions.

## LESSONS WE'VE LEARNED

### Language in Agency Decisions and Notices Concerning the Right to Judicial Review of Agency Decisions

An agency's job does not end when it writes a good decision addressing the merits of the matter; in order to avoid being overturned by a court, an agency must also make sure that it provides accurate information in its decision concerning whether or not judicial review is available and (if the decision is subject to judicial review) the forum in which such review is available. See, e.g., G.L. c. 30A, § 11(8). In addition, an agency also must provide notice of the decision to the proper persons.

Several recent cases underscore the importance of accuracy in agency decisions concerning the availability of judicial review of such decisions. In particular, agencies should be careful not to include automatically in every decision a "boilerplate" judicial review provision stating that the decision is subject to judicial review under G.L. c. 30A, § 14, because some "decisions" are not reviewable under G.L. c. 30A.

In one recent case, an agency's inadvertent use of "boilerplate" language resulted in the agency having to defend itself in litigation challenging a "decision" which was not, in fact, a "final decision of any agency in an adjudicatory proceeding" subject to review under G.L. c. 30A. The agency had determined to conduct an informal, investigatory hearing on citizen complaints about a licensee's conduct, and the licensee agreed to such a hearing. At the hearing, the agency chairman emphasized that the hearing was not "adjudicatory" in nature, that the hearing would not entail a determination as to whether the licensee had committed any violation, and that the purpose of the hearing was merely to gather information so that the agency could determine whether to further investigate the licensee's conduct.

Following the informal hearing, and pursuant to G.L. c. 30A, § 8, the agency issued an advisory ruling which included certain factual findings concerning the conduct of the licensee's business. The advisory ruling also included a warning suggesting that the licensee cooperate with the citizens in addressing the issues. Although the agency had made clear at the hearing that it was not "adjudicatory" in nature (and therefore the resulting decision was not a "final decision . . . in an adjudicatory proceeding" under G.L. c. 30A, § 14), the agency included in its advisory notice the standard, boilerplate language stating that the decision was subject to judicial review pursuant to G.L. c. 30A.

The licensee then sought to "appeal" the advisory ruling by filing an action in Superior Court under G.L. c. 30A, § 14. On behalf of the agency, the Office of the Attorney General filed a motion to dismiss the complaint for lack of subject matter jurisdiction on the ground that the informal hearing did not constitute an "adjudicatory proceeding" and that the agency's advisory ruling therefore was not subject to review under chapter

30A. However, the court denied the motion on the ground that the licensee relied upon the notice concerning the right to judicial review, with the result that the agency was required to defend the action on the merits.

In opposing the licensee's motion for judgment on the pleadings, the agency renewed its argument that the proceeding resulting in issuance of the advisory ruling did not meet the definition of an "adjudicatory proceeding" set forth in G.L. c. 30A, § 1, since the agency did not "determine" the "legal rights, duties or privileges" of the licensee. The agency further argued that, even if the informal hearing constituted an adjudicatory proceeding, the advisory ruling was based on substantial evidence of complaints against the licensee. The Court nevertheless rejected the agency's arguments and ruled in favor of the licensee on the merits of the case.

The foregoing case should serve as a reminder to agencies to review their use of "boilerplate" judicial review notices. For a helpful discussion of what constitutes an "adjudicatory proceeding" within the meaning of G.L. c. 30A, see Town of Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 108-09 (1984).

Agencies similarly should be careful not to include standard judicial review notices in decisions that are not "final decisions" and therefore are not subject to review under G.L. c. 30A. For example, a decision by an agency to remand a matter to a another state entity or local decision making entity generally does not constitute a "final" agency decision and therefore is not subject to judicial review under chapter 30A. See, e.g., Town of East Longmeadow v. State Advisory Commission, 17 Mass. App. Ct. 939, 940 (1983) (rescript) ("An administrative order requiring a subordinate administrative body to reconsider its order is neither final nor appealable" under G.L. c. 30A, § 14). Cf. Kelly v. Civil Service Commission, 427 Mass. 75, 76 n.2 (1998) (recognizing that, "[a]lthough a court-ordered remand typically is not subject to appeal, . . . an exception to this general rule exists where an administrative agency appeals a remand order that is final as to that agency.").

Agencies also should review their notices to ensure that the notices accurately describe the forum in which judicial review is

available, since some agency decisions are reviewable in a particular court, while other decisions are reviewable in a different court or by another agency. See G.L. c. 30A, § 11(8) (parties to a proceeding shall be notified of an agency decision and "of their rights to review or appeal the decision within the agency or before the courts, as the case may be . . . .").

A related issue concerns the requirement in G.L. c. 30A, § 11(8), that "[p]arties to the proceeding shall be notified in person or by mail of the decision . . . ." The statute further provides that "[a] copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each party and to his attorney of record." G.L. c. 30A, § 11(8). Thus, an agency is required to provide notice of the decision to a party and, upon request, an agency is required to mail a copy of the decision itself (and statement of reasons) to the party and his counsel. In addition, under G.L. c. 30A, § 14, actions for judicial review must be commenced within 30 days after "receipt of notice of the final decision of the agency." In circumstances where a party has been represented by counsel during the course of proceedings before the agency, it would be prudent for the agency to provide counsel with notice of the decision as well as the decision itself, notwithstanding that G.L. c. 30A, § 11(8), only requires the agency to provide counsel with a copy of the decision itself (and only upon counsel's request). Providing notice of a decision to counsel simultaneously with notice to the party can help avoid needless litigation concerning whether an appeal was timely filed within 30 days of the party's receipt of notice of the decision. In addition, agencies' own regulations in some cases may require agencies to provide notice of the decision, as well as the decision itself, to counsel.

In two recent cases handled by our Office seeking judicial review of agency decisions under G.L. c. 30A, the Office sought to dismiss complaints for lack of subject matter jurisdiction based on the party's failure to file the action within the 30 day period following the party's receipt of notice of the decision. In one case, the party argued that the agency had failed to send the decision to counsel of record within the 30 day appeal period. The Court granted the agency's motion to dismiss, since counsel (and the party) had received actual notice of the decision within the 30 day period (even though the attorney had

not received the decision itself within that time period). In a second case, the agency sent a notice of the decision to both the party and his counsel, but due to a change of address, the counsel did not receive the notice until some time after the party received the notice (but within 30 days of the party's receipt of notice). The party nevertheless failed to file the action until more than 30 days after the party's receipt of notice of the decision (but within 30 days of counsel's notice of decision). The Superior Court granted the agency's motion to dismiss. The plaintiff appealed the case to the Appeals Court, where the case is awaiting the scheduling of oral argument. Although the agencies thus far were successful in the two foregoing cases, the cases serve as a reminder that agencies can avoid needless litigation over the issue of timeliness of notice by serving notices of a decision simultaneously on parties and their counsel.

The Office of the Attorney General is available to advise agencies concerning whether particular types of decisions are "final decisions" in an "adjudicatory proceeding" subject to judicial review under G.L. c. 30A. We also are available to review the judicial review notices used by agencies with respect to different types of cases. (Contact: AAG Judith Yogman, Chief, Administrative Law Division)

**Recent Developments in Judicial Review of**
**Administrative Agency Decisions Under Chapter 30A**

In reviewing the decisions of the Supreme Judicial Court and the Appeals Court in petitions for judicial review of state administrative agency decisions during the 1996-97 court year,[1] our Office was struck by what appeared to be an unusually high number of reversals and remands of agency decisions. Of the 28 reported decisions reviewing the merits of agency decisions, the appellate courts remanded or reversed, at least in part, 13 agency decisions and affirmed 15, a reversal rate of

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[1]For purposes of this article, a court year refers to the period from October 1 of one year to September 30 of the next year.

approximately 46 percent.[2]

This seems to be part of a trend in the direction of reversals. Ten years ago, in 1986-87, the appellate courts reversed only 1 out of 15 agency decisions reviewed on the merits,[3] a reversal rate of only 7 percent; and five years ago, in 1991-92, the appellate courts reversed 3 out of 14 agency decisions,[4] a higher reversal rate of 21 percent, but still far lower than the past year's almost even win-loss record for agency decisions on appeal.

These statistics provoke but do not answer the question of why agency decisions are faring worse on judicial review now than they did five or ten years ago. Are courts taking a "harder look"[5] at agency decisions and, perhaps, more freely substituting their judgment for that of the agencies? Or are agency decision makers relying too heavily on the deferential standards of review

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[2]Broken down by appellate court, the statistics are as follows: The Appeals Court reversed agency decisions in 10 out of 19 reported cases, a reversal rate of 53 percent; and the Supreme Judicial Court reversed agency decisions in 3 out of 8 reported cases, a reversal rate of 37 percent. The Appeals Court reversal rate may be exaggerated, to some extent, by the fact that many Appeals Court decisions, i.e., those issued pursuant to Appeals Court Rule 1:28, are not reported.

[3]In the one case in which the appellate court reversed an agency decision, City of Springfield v. Dir. of Div. of Employ. Sec., 398 Mass. 786 (1986), the reversal was premised on the Division of Employment Security's error of law in construing an ethics statute, G.L. c. 268A, in which that agency had no particular expertise.

[4]Adams v. Contributory Retirement Appeal Bd., 31 Mass. App. Ct. 171 (1992); Reep v. Dep't of Employment & Training, 412 Mass. 845 (1992) (reversing agency decision over three dissents); Rate Setting Comm'n v. Faulkner Hosp., 411 Mass. 701 (1992).

[5]What has come to be known as the "hard look doctrine" was first articulated in cases involving judicial review of agency rulemaking, rather than agency adjudicatory decisions. See Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co., 463 U.S. 29, 43 (1983); Portland Cement Ass'n v. Ruckelhaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 1115 (D.C. Cir. 1971); see also Patricia M. Wald, Thirty Years of Administrative Law in the D.C. Circuit, Ad. Law Bull., July 22, 1997, at 1, 3 (analyzing trends in judicial review of agency rulemaking under the federal APA).

set forth in G.L. c. 30A, § 14,[6] and failing to make sufficiently detailed findings, to ensure that their findings are adequately supported by the evidence in the record, and to articulate the reasons for their decisions? The answer is, probably, a little of both.

A closer look at the cases in which agency decisions were found lacking by the courts provides some useful guidance for agency decision makers, prosecutors, and general counsel and for those defending agency decisions in court. The grounds for the courts' reversal or remand of agency decisions on the merits during the past year fall into three categories, corresponding to various provisions of Chapter 30A: absence of essential findings of fact or inadequate explanation of the reasons for its ultimate conclusions,[7] lack of substantial evidence,[8] and errors of law in interpreting the applicable statutes and regulations.[9] In each category, this year's decisions further amplify and illustrate the application of the well-worn statutory standards.

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[6] Under Chapter 30A, § 14(7), which governs judicial review of most adjudicatory decisions of state agencies, the reviewing court may set aside or modify an agency decision only "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is—

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

© Based upon an error of law; or

(d) Made upon unlawful procedure; or

(e) Unsupported by substantial evidence; or

(f) Unwarranted by facts found by the court on the record . . .; or

(g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." In applying these standards of review, courts are required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." Id.

[7] G.L. c. 30A, § 11(8).

[8] G.L. c. 30A, §§ 1(6), 14(7)(e).

[9] G.L. c. 30A, § 14(c).

**Statement of Reasons**

In four cases,[10] agency decisions were reversed or remanded on the ground that the agency failed to provide an adequate "statement of reasons for the decision including determination of each issue of fact or law necessary to the decision."[11] These cases provide specific guidance that should prove useful to those who draft agency decisions as well as those who defend or challenge those decisions in court. At least four specific lessons can be drawn from these cases:

1. The agency should make findings on every subsidiary fact that is legally material to its ultimate findings and conclusions.[12] While it may not be necessary to make "a specific finding as to every single subcalculation in every case,"[13] a mere summary of the parties' positions, even if lengthy and detailed, followed by brief conclusory findings on the ultimate factual and legal issues, will not suffice.[14] If the applicable statute, regulation, or case law requires consideration of various factors, the agency's decision should not simply list the factors considered; rather, it should contain factual findings relevant to each factor considered.[15]

2. It is particularly important that the agency make findings where the record contains contradictory evidence on the factual issue in question.[16] It is not sufficient, in this

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[10] MIT v. Dep't of Pub. Util., 425 Mass. 856 (1997); Herridge v. Bd. of Reg. in Med., 424 Mass. 201 (1997) (Herridge II); Prescott v. Bd. of Appeal on Motor Vehicle Liab. Policies and Bonds, 42 Mass. App. Ct. 36 (1997); City of Boston v. Outdoor Adver. Bd., 41 Mass. App. Ct. 775 (1996).

[11] G.L. c. 30A, § 11(8).

[12] MIT, 425 Mass. at 871; see also Prescott, 42 Mass. App. Ct. at 39 (reversing agency decision for failure to make a finding on a material point).

[13] MIT, 425 Mass. at 869 n.30.

[14] Id.

[15] Id. at 872-73.

[16] Id. at 874 n.42; see also City of Boston, 41 Mass. App. Ct. at 782 (remanding agency decision based on agency's "failure to consider and act upon

regard, for the agency decision maker simply to state that he credits one witness's testimony over another's.[17] Rather, when faced with conflicting testimony by different witnesses, the agency must "'provide a thorough and reasoned explanation for the decision to credit'" a witness's testimony on a particular point.[18]

3. The agency should explain how its legal conclusions follow from its factual findings.[19] Where the applicable legal standard is one of reasonableness, it is important for the agency to explain, in some detail, why its conclusions are reasonable and how it balanced the applicable factors.[20] The agency should also explain why it rejected the legal claims made by the losing party.[21]

4. Finally, an agency's failure to include an adequate statement of reasons in its decision cannot necessarily be cured by the factual and legal analysis contained in the memorandum of law or appellate brief filed by counsel for the agency in court.[22] However, particularly where the administrative record is of manageable size and the factual issues are not complex, the reviewing court may be persuaded to look directly to the evidence in the record to determine whether the agency's decision is

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a substantive issue put forward by a party to the proceedings").

[17] Herridge II, 424 Mass. at 204-06.

[18] Id. at 204 (quoting Herridge v. Bd. of Reg. in Med., 420 Mass. 154, 156 (1995) (Herridge I)). Conversely, where sufficient credibility findings are made, the reviewing court will ordinarily defer to the agency's decision to credit one witness over another. See, e.g., Franclemont v. Comm'r of DET, 42 Mass. App. Ct. 267, 272 n.6, 273-74 (1997).

[19] MIT, 425 Mass. at 871.

[20] Id. at 871-73.

[21] Id. at 874 n.42.

[22] Id. at 869 n.30 ("In its brief to this court, the department argues that the evidence 'amply supported' [the agency's conclusions], referring us for the first time to numerous parts of the record. The barrage of footnotes in its brief is not an adequate substitute for the requisite subsidiary findings in its decision.").

factually and legally sound.[23]

**Substantial Evidence**

In five cases decided this year,[24] the Appeals Court's reversal of an agency decision rested, at least in part, on the court's determination that the agency's decision was "[u]nsupported by substantial evidence."[25] The lessons to be learned from these decisions are:

1. Because the substantial evidence test is highly deferential to agencies, agency decisions are rarely overturned on this ground. However, the Appeals Court had occasion several times this year to rely on the limiting principle that directs the reviewing court to base its determination "'upon consideration of the entire record,'"[26] including "'whatever in the record fairly detracts from its weight.'"[27] Under this standard, even if there is some evidence in the record to support the agency's factual findings, the reviewing court can properly reverse an agency's determination where the "evidence points to an overwhelming probability of the contrary."[28]

2. In two cases involving appeals from decisions by the Department of Social Services substantiating child abuse

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[23] See, e.g., Coggin v. Mass. Parole Bd., 42 Mass. App. Ct. 584, 588 n.7 (1997).

[24] Goncalves v. Labor Relations Comm'n, 43 Mass. App. Ct. 289 (1997); Salaam v. Comm'r of DTA, 43 Mass. App. Ct. 38 (1997); Arnone v. Comm'r of DSS, 43 Mass. App. Ct. 33 (1997); Edward E. v. DSS, 42 Mass. App. Ct. 478 (1997); Prescott v. Bd. of Appeal on Motor Vehicle Liab. Policies and Bonds, 42 Mass. App. Ct. 36 (1997).

[25] G.L. c. 30A, § 14(7)(e); see also G.L. c. 30A, § 1(6) (defining "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion").

[26] E.g., Edward E., 42 Mass. App. Ct. at 480 (quoting G.L. c. 30A, § 14(7)).

[27] E.g., id. at 481 (citing numerous authorities); see also Salaam, 43 Mass. App. Ct. at 44.

[28] Goncalves, 43 Mass. App. Ct. at 296.

complaints, the Appeals Court provided further guidance on the long-standing question of whether uncorroborated hearsay can constitute substantial evidence for purposes of supporting an agency's decision under Chapter 30A.[29] While still not providing an absolute answer to that question, the court indicated that, at least in cases where the hearsay statements involved are those of very young children, and the agency determination "has overtones of criminal conduct . . . likely to cast a shadow over the person concerned indefinitely," an agency decision "needs to rest on something more solid than exclusively hearsay."[30] On the other hand, where the hearsay statements bear indicia of reliability, such as spontaneity, specificity, consistency over time, etc., and the consequences of the agency decision are not so grave, then uncorroborated hearsay may be sufficient.[31] Because it is difficult to predict how courts will rule on this issue in particular cases, parties to administrative proceedings should be wary about relying exclusively on hearsay evidence to support their positions.

3. Another substantial evidence point, made by the Appeals Court in the Prescott case, is that an agency's disbelief of a witness's testimony on a particular point does not constitute substantial evidence of the opposite proposition.[32]

**Error of Law**

In seven cases,[33] the appellate court's reversal or remand of

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[29] Arnone, 43 Mass. App. Ct. at 34-37; Edward E., 42 Mass. App. Ct. at 480-81, 484-87.

[30] Arnone, 43 Mass. App. Ct. at 37; see also Edward E., 42 Mass. App. Ct. at 487.

[31] Edward E., 42 Mass App. Ct. at 484-86 (dicta).

[32] Prescott v. Bd. of Appeal on Motor Vehicle Liab. Policies and Bonds, 42 Mass. App. Ct. 36, 38 n.4 (1997).

[33] 1010 Memorial Drive Tenants Corp. v. Fire Chief of Cambridge, 424 Mass. 661 (1997); City of Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300 (1997); Goncalves, 43 Mass. App. Ct. 289; Salaam v. Comm'r of DTA, 43 Mass. App. Ct. 38 (1997); Christensen v. CRAB, 42 Mass. App. Ct. 544 (1997); Leal v. CRAB, 42 Mass. App. Ct. 330, review denied, 425 Mass. 1105 (1997); Tesson v. Comm'r of DTA, 41 Mass. App. Ct. 479 (1996).

an agency's decision was based, at least in part, on the court's determination that the agency had erred in interpreting its own enabling legislation or regulations. Because courts are the final arbiters on questions of law, it is not surprising that more agency decisions were reversed on this than on any other ground. However, what is worth noting is that, in all but one of these cases,[34] the court made no mention whatsoever of the well-established principle (cited in many other cases in which the court affirmed the agency's decision)[35] that courts should defer to an agency's reasonable interpretation of its enabling statute and implementing regulations. Perhaps the lesson to be drawn from this is that judicial deference to agency determinations on legal issues is unlikely to be dispositive in judicial review of agency decisions, particularly where there are other grounds on which the reviewing court is otherwise inclined to affirm or reverse the agency's ruling. (Contact: AAG Judith Yogman, Chief, Administrative Law Division)

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[34] Salaam, 43 Mass. App. Ct. at 44 ("The deference which an agency decision is due does not extend to an unreasonable interpretation of its regulations.").

[35] See, e.g., Thomas v. Comm'r of DMA, 425 Mass. 738, 748 (1997); Dowling v. RMV, 425 Mass. 523, 525-26 (1997); Tarin v. Comm'r of DMA, 424 Mass. 743, 750-51 (1997); Iodice v. Arch. Access Bd., 424 Mass. 370, 373-76 (1997); Barnstable County Ret. Bd. v. CRAB, 43 Mass. App. Ct. 341, 345, 347, review denied, 426 Mass. 1101 (1997); Coggin v. Mass. Parole Bd., 42 Mass. App. Ct. 584, 587 (1997).

## RESOURCES AVAILABLE FROM THE ATTORNEY GENERAL

### Written Materials

Below is a summary of some of the written materials that our office makes available to agency counsel, with a note on how to obtain them. Items described in the "New Materials" section immediately below are new items that have not been described in previous issues of the Agency Counsel Newsletter. Items listed in the "Additional Materials" section are items that have been described more fully in a previous issue; for more information on those items, call the contact persons. All contact persons may be reached through our main telephone number, 727-2200, unless otherwise noted.

### New Materials

1. 30A Forms--These training materials, assembled in December 1997, contain a number of useful sample pleadings, including a motion to dismiss an untimely complaint, an answer, an agreement for order on preliminary injunction, an opposition to a motion for discovery, an opposition to a motion for leave to present additional evidence, and an opposition to a motion to present testimony of alleged procedural irregularities in an administrative proceeding. The Forms also include useful information on Standing Order 1-96, including a memorandum summarizing the requirements of the Standing Order. To obtain a copy of the Forms, contact Sherrie Costa, Administrative Law Division.

### Additional Materials

1. Office of the Attorney General's Electronic Mail Policy -- The Office of the Attorney General recently developed this policy regarding the appropriate use of the Office's electronic mail system. Agencies interested in obtaining further information about the policy should contact Dorothy Amichetti at 727-2200, ext. 2055.

2. Workshop for State Agency Counsel -- The State Ethics Commission published this guide in connection with workshops it held in April and May, 1997. The publication contains

information about the conflict of interest law and how it relates to solicitation by state employees, business travel by state employees paid by private entities, negotiating for prospective employment, and many other related issues. To obtain a copy of the publication, contact the Public Education Division of the Ethics Commission at 727-0060.

3. Absolute and Qualified Immunity -- These materials from a January 1996 training session include: (1) an outline of the different types of absolute immunity, including, of particular interest to agency counsel, immunity for agency officials acting in quasi-adjudicatory, quasi-legislative, and prosecutorial capacities; and (2) a discussion of qualified immunity defenses, including their elements, how to raise and support them, and their applicability to federal and state claims. A videotape of the training session is also available. (Contact: Sherrie Costa, Administrative Law Division)

4. Government Bureau Training/Updated 10/93-4/94 (Contact: Sherrie Costa, Administrative Law Division)

5. The Public Records Law--A User's Manual (Revised) (Contact: Betty Lamacchia, Consumer Protection/Antitrust Division)

6. Boston Bar Association Civil Litigation Standards -- (Contact: Sherrie Costa, Administrative Law Division)

7. Employment Rights of Individuals With Disabilities -- (Contact: Sherry Dong, Paralegal in the Civil Rights Division)

8. Eminent Domain and Contract Interest Statutes--Recent Amendments -- (Contact: AAG John Bigelow, Chief of the Trial Division)

9. Guidelines for Agency Counsel-Attorney General Relations in Defensive Litigation -- (Contact: Sherrie Costa, Administrative Law Division)

10. Sexual Harassment: Policy and Training Materials -- (Contact: Geeta Prasad, Paralegal in the Civil Rights Division)

11. Title II of The Americans with Disabilities Act -- (Contact: Sherry Dong, Paralegal in the Civil Rights Division)

12. Chapter 30A/Administrative Law Training (Contact: Sherrie Costa, Administrative Law Division)

13. Brief Bank -- (Contact: Sherrie Costa, Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse)

14. Government Bureau Form Files -- (Contact: Sherrie Costa, Administrative Law Division, or come to One Ashburton Place, Room 2019, and browse)

15. State Administrative Decisions: How to Write Them, Challenge Them or Defend Them -- (Contact: Sherrie Costa, Administrative Law Division)

16. Compendium of Government Law -- (Contact: Sherrie Costa, Administrative Law Division)

17. Protecting Agency Personnel from Depositions -- (Contact: Sherrie Costa, Administrative Law Division)

18. The Massachusetts Tort Claims Act -- (Contact: Janet Elwell, Trial Division)

19. Discovery Practice and Procedure -- (Contact: Janet Elwell, Trial Division)

20. Government Bureau Report -- (issued every two months; contact Sherrie Costa, Administrative Law Division)

21. Notes on Relations between the Attorney General and Agencies -- (Contact: Sherrie Costa, Administrative Law Division)

22. Guidelines for Formal Attorney General Opinions -- (Contact: AAG Amy Spector, Opinions Coordinator, Administrative Law Division)

23. Open Meeting Law Guidelines -- (Contact: AAG Maurice Cunningham, Regulated Industries Division)

24. Soliciting Signatures on Nomination Papers and Initiative Petitions on Public Property -- (Contact: AAG Margaret Monsell, Administrative Law Division

25. Civil Litigation Guidelines -- Copies of the Guidelines have already been sent to agency counsel; additional copies are available from Sherrie Costa in the Administrative Law Division.

26. Presentment Procedures -- Copies of a memorandum dated October, 1992, regarding the presentment of tort claims against state agencies under G.L. c. 258, § 4, have already been sent to agency counsel. Additional information and copies are available from AAG Bill Daggett, Managing Attorney of the Trial Division.

27. Chapter 30A/Administrative Law Training videotape -- (Contact: Sherrie Costa, Administrative Law Division)

28. "How to Define the Public Interest -- the Attorney General's Litigation Choices" videotape -- (Contact: Sherrie Costa, Administrative Law Division)

## How Can We Help?

Are there areas not mentioned in our list of resources in which our advice could be helpful? For example, could you or other agency personnel benefit from written materials and/or training sessions concerning difficult employees and employment litigation? Conducting investigations? Evaluating tort claims? Please contact AAG Pierce Cray, Training Coordinator in the Government Bureau, if you would like to discuss your ideas along these lines.

## How Can YOU Help?

Has your agency developed training materials or other resources that you think might be useful to other agencies? If so, please contact AAG Pierce Cray and we will list and describe your item(s) in future issues of this Newsletter so that other agency counsel can contact you directly.

Also, you can help us by keeping us informed of anticipated or potential litigation. Please contact Peter Sacks, Chief of the Government Bureau, or the appropriate division chief.

Our office is also available to review proposed regulations and legislation, to consider the potential for litigation and the defensibility of the regulations or legislation. We are also available to review notice forms and to consider the potential for litigation arising from such notices.

## ASSISTANCE AND CONTACTS IN THE OFFICE OF THE ATTORNEY GENERAL

The main telephone number for all extensions listed below is (617) 727-2200.

Scott Harshbarger, Attorney General ..... 2042
Douglas Wilkins, First Assistant Attorney General ..... 2068

Government Bureau

Peter Sacks, Chief ..... 2064
Ernest Sarason, Affirmative Litigation Coordinator ..... 3220
John Bowman, Appeals Coordinator ..... 3311
Pierce Cray, Training Coordinator ..... 2084

Administrative Law Division

Judith Yogman, Chief ..... 2066
Jamie Katz, Managing Attorney ..... 2092
Robert Ritchie, Municipal Law Director ..... 2073
and (413)784-1240
Amy Spector, Opinions Coordinator ..... 2076
Jamie Katz, ADR Coordinator ..... 2092
Edward DeAngelo, Public Records Officer ..... 2093

Trial Division

John Bigelow, Chief ..... 3310
William Daggett, Managing Attorney ..... 3327
Sal Giorlandino, Public Records Officer ..... 3312

Environmental Protection Division

Jim Milkey, Chief ..... 3347
William Pardee, Chief Litigation Counsel and
Public Records Officer..... 3353

Public Protection Bureau

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Freda Fishman, Deputy Chief ..... 2926
Maurice Cunningham, Open Meeting Law Contact ..... 3452

Criminal Bureau

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Diane Juliar, Chief ..... 2878

Business and Labor Protection Bureau

Stuart Rossman, Chief ..... 3232

Western Massachusetts Division (Springfield)

Edward Berlin, Chief ..... (413) 784-1240

## RESPONSE SHEET

We hope that you enjoyed this eighth issue of Attorney General Scott Harshbarger's Agency Counsel Newsletter. We have sent one copy to each agency on our mailing list. If your agency has more than one lawyer and would like to receive more than one copy of this and future issues, or if your agency does not yet appear on our mailing list, please fill in this form and return it to Deborah Anderson, Administrative Law Division, One Ashburton Place, 20th Floor, or telephone us at 727-2200 ext. 2070.

Also, if you have any comments or suggestions for topics to be addressed in future issues, please indicate them below.

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Name of Agency:_____

1. Please send our agency ___ additional copies of this and future issues, at the following address:

2. Also, please send copies to the following address(es):

Send ___ copies to:

Send ___ copies to:

3. Comments and suggestions for topics to be addressed in future issues:

Thank you for your cooperation and your ideas.

# OFFICE OF THE ATTORNEY GENERAL

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**Bureau Chief**

Ernie Sarason ..... x 3220
**Affirmative Litigation Director**

Mark Kmetz ..... x 2156
**CA/T Cost Recovery**

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**Division Chief**

William Pardee ..... x 3353
**Chief Litigation Counsel**

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**Appeals Coordinator**

Pierce Cray ..... x 2079
**Training Coordinator**

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**Division Chief**

Bill Daggett ..... x 3327
**Managing Attorney**

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Jason Barshak ..... x 3316
Matthew Berge ..... x 3350
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John Bowen ..... x 3307
Margaret Bulger ..... x 3331
Stephen Dick ..... x 3324
Deborah Ecker ..... x 3309
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Leslie Greer ..... x 3300
Irene Guild ..... x 3314
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Kara Lucciola ..... x 3337
Beth McLaughlin ..... x 3308
Howard Meshnick ..... x 3320
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Ernest Sarason ..... x 3220
Neil Sherring ..... x 3325
Richard Spicer ..... x 3221
Mark Sutliff ..... x 3317
James Sweeney ..... x 3321
Lucy Wall ..... x 3329
Alice Winn ..... x 3332

**AAGs assigned to both Administrative Law and Trial Divisions:**

Stephen Dick ..... x 3324
Beverly Roby ..... x 3326

**FAX #s:**

**AD LAW DIVISION ..... (617) 727-5785**
**ENVIRONMENTAL PROTECTION DIV. (617) 727-9665**
**TRIAL DIVISION ..... (617) 727-3118**

4/22/98

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## WHEN YOUR AGENCY, OR AN OFFICIAL OF IT, IS SUED:

1. Examine the summons to see if there is a temporary restraining order and/or a short order of notice indicating that a hearing is scheduled on an application for a preliminary injunction.

a. If there is a temporary restraining order, you are already under court order and must obey until it is vacated, either by further order of the court or at the expiration of ten days.

b. If there is a hearing scheduled, we need to know ASAP. Call Judy Yogman, Chief of the Administrative Law Division, 727-2200, ext. 2066, right away, and then have the summons and complaint faxed (727-5785) or hand-delivered to Judy.

2. Even if there is no TRO or P.I., you may be able to tell from the complaint whether the case is likely to need immediate attention. If it does, call Judy and have the materials faxed (727-5785) or hand-delivered right away.

3. Even if you see no need for immediate action, send the summons and complaint, and all other materials you received with it, to us as soon as possible, addressed to First Assistant Doug Wilkins.

4. Note exactly when and how you received service, and include that information in your cover letter. This is particularly important in cases naming officials in their individual capacity.

5. In individual capacity cases, we will need a letter from the named defendant indicating that they choose to have representation from the Attorney General, and that they understand and accept the conditions of our representation. We will provide you with forms.